Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-939

DELAWARE STATE COLLEGE, *et al.*,
*Petitioners*
[Additional Petitioners listed inside cover]

*v.*

COLUMBUS B. RICKS, *Respondent*

## BRIEF FOR RESPONDENT IN OPPOSITION

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

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*The other Petitioners are as follows:
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DELMA LAFFERTY,
JAMES H. WILLIAMS,
WILLIAM S. YOUNG,
BURT C. PRATT,
LUNA I. MISHOE,
PIERRE S. DUPONT, IV,
M. MILFORD CALDWELL,
GEORGE W. MCLAUGHLIN,
ROMEO C. HENDERSON,
HARRIET R. WILLIAMS,
ARTHUR E. BRAGG,
ORA BUNCH,
EHSAN HELMY,
VERA POWELL,
JOHN R. PRICE,
HERBERT THOMPSON,
W. RICHARD WYNDER,
ULYSSES WASHINGTON, and
JANE LASKARIS.

M. MILFORD CALDWELL died on October 27, 1979.

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## OPINIONS BELOW

The opinions of the court of appeals and of the district court are found at pages cited on page one of the petitioner's brief.

## JURISDICTION

The jurisdiction of this court is as stated at page two of petitioner's brief.

## QUESTIONS PRESENTED

1. Whether respondent filed a timely charge of national origin discrimination on a continuing violation within the time period required by 42 U.S.C. §2000-5(e).

2. Whether respondent's claim for relief pursuant to 42 U.S.C. §1981 accrued at a point in time within three years of which he filed a court complaint.

## STATUTES INVOLVED

In addition to the statutes found at page ten and eleven of petitioner's brief, the following statute is involved.

> 86 Stat. 105 (1972), Title 42 U.S.C. §2000e-2(a) "It shall be an unlawful practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . ."

## STATEMENT OF THE CASE

Respondent, Columbus B. Ricks, Ph.D. is a black male Liberian who was employed by the petitioner through the years 1970 to 1975 as a Professor of Education and Coordinator of Science Education. In February, 1973, he was considered for and denied academic tenure, but at the same time was given a one-year contract and advised that he would be considered for tenure the following year. In February, 1974, petitioner's Committee on Promotions and Tenure again recommended that respondent be denied tenure. Petitioner's Board of Trustees ("Board") met on March 13, 1974 and accepted the recommendation of the Committee on Promotions and Tenure. In April, 1974, Respondent filed a grievance with petitioner's Educational Policy Committee. In June, 1974, the petitioner's Board advised the respondent that he was being given a terminal contract for the year commencing on September 1, 1974 and terminating on June 30, 1975. (Pet. A. 3a-4a) At the same time, the Board advised respondent that the award of a terminal contract was to satisfy the requirements of the Board and of the American Association of University Professors (AAUP), whose guidelines it apparently thought to be governing. (A. 53)

By letter of September 12, 1974, respondent was advised by the Board that he was not being granted tenure. (A. 21) During the course of respondent's employment with petitioner, he was subjected to a continued series of events and incidents which ultimately deprived him of his employment because of his national origin (A. 16-18, 22-24). These events continued up through the end of his employment with petitioner in 1975.

On April 4, 1975, respondent filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).[1] On June 7, 1977 respondent was

1. Although the court complaint (A. 24) states that the date of the charge is April 7, 1975, a copy of the EEOC charge indicates the date of filing to be April 4, 1975 (Court of Appeals A.-18).

sent a right to sue letter by the United States Department of Justice. On September 9, 1977 respondent filed a complaint in the United States District Court for the District of Delaware. Relevant portions of the complaint allege that he was discriminated against and terminated because of his national origin in violation of 42 U.S.C. §2000(e)-5 (Title VII) and 42 U.S.C. §1981 (1981) (Pet. A. 4a).

The district court dismissed the Title VII claim on the basis that respondent failed to file a charge with the EEOC "within 180 days after the alleged unlawful employment practice occurred" as required by 42 U.S.C. §2000(e)-5(e). The district court also dismissed the Section 1981 claim as barred by the three-year Delaware statute of limitations governing such claims. It also dismissed several other claims alleged by respondent. Respondent appealed from the district court's dismissal of the Title VII and 1981 claims only (Pet. A. 4a-5a). On September 18, 1979 the United States Court of Appeals for the Third Circuit entered a judgment reversing the dismissal of the Title VII and 1981 claims and remanding the matter for proceedings consistent with its opinion (Pet. A. 19a). Petitioner sought review by way of Certiorari, and an order allowing Certiorari was entered by this Court on February 19, 1980 (A. 103).

## SUMMARY OF ARGUMENT

The question that is raised by this appeal is when under the particular statutes in question, Title VII and 42 U.S.C. §1981, does a violation occur. Petitioner and respondent are in agreement that the appropriate and relevant time period during which a charge of discrimination must be filed with the EEOC and within which a lawsuit must be filed under 42 U.S.C. §1981 are 180[2] days and three years[3] respectively.

The question for this court is when on the peculiar facts of this case did the violation of Title VII and 1981 actually occur. This will be determined by the date which this Court holds to be the last act of discrimination and by whether or not this Court concludes, as did the court of appeals, that the violations alleged were continuing. On the record before it, the court of appeals held effectively that the respondent alleged sufficient facts to withstand a motion to dismiss on the issues of whether his charge was timely filed with the EEOC and of whether his 1981 claim had been instituted within three years of the statute of limitations governing such claims. The standard applied in such a review is that enunciated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). That test is that a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should be granted only if ". . . it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." With respect to Title VII, the court of appeals held that the latest violation of that statute occurred at the end of respondent's employment with petitioner on June 30, 1975, the last day on which he worked for the petitioner. It further held on the record before it that the violations alleged by the petitioner were continuing in nature.

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2. 42 U.S.C. §2000e-5(e)
3. 10 Del. C. §8106

With respect to the 1981 claim, the court of appeals held that the violation alleged thereunder occurred also on June 30, 1975 and consequently, the instant lawsuit instituted within three years of that date was not barred by the statute of limitations agreed by both parties and held by the court of appeals to govern this claim.

## ARGUMENT

### I. The Respondent Alleged Violations Of Title VII Which Were Continuing In Nature and Concluded At His Termination On June 30, 1975.

Respondent has alleged in his complaint that petitioner and its agents engaged in a course of conduct that discriminated against him because of his national origin. Specifically, he has alleged that the actions of the petitioner in denying him tenure and terminating him discriminated against him because of his national origin. He has alleged that this course of conduct commenced in 1972 when he was not considered for tenure on schedule and continued to the conclusion of his employment on June 30, 1975.

Petitioner argues that the respondent should not be allowed to pursue this claim in court because the actions alleged by respondent are barred by a time limitation set forth in Title VII. That time limitation provides that a charge alleging discrimination under Title VII must be filed within 180 days of the date of the alleged violation. Respondent does not dispute that charges alleging a violation occurring outside of the 180 day period are untimely and cannot form the basis, either of an EEOC charge or of a court suit arising out of such charge. On the other hand, however, a charge alleging that a violation occurred within 180 days of its filing is a timely charge and may be the subject of a lawsuit instituted to redress those violations. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Petitioner and respondent are in dispute only as to when on the facts of the instant case the alleged violation of Title VII took place.

Respondent's charge before the EEOC (A. 29) filed on April 4, 1975 alleges that he would be terminated on June 30, 1975 because of his national origin. It is respondent's position that a timely charge in this matter could be filed at any time up to 180 days after his date of discharge on June 30, 1975. Further, it is respondent's

position that the fact that he filed the charge approximately two months before the date of discharge should be of no legal consequence in this Court's consideration and ultimate determination as to the exact time at which the charge would have been filed. *Egelston v. State University College at Genesco*, 535 F.2d 752 (2nd Cir. 1976); *Noble v. University of Rochester*, 535 F.2d 756 (2nd Cir. 1976).

The substance of respondent's complaint is that during the course of his employment with petitioner he was subjected to a course of conduct that was designed to remove him from his employment with petitioner. That conduct was effected over a long period of time, commencing in February, 1972 when he was initially not considered for tenure and continuing on up into 1973 and 1974 when on two other occasions, he was denied tenure. In the interim, and thereafter, respondent was subjected to a course of conduct that made his teaching conditions intolerable. Among other things, he was falsely accused of being a poor teacher, insulted in front of his students, pressured to change student's grades, had his job duties as Coordinator of Science Education and Director of UPSTEP interfered with, denied the opportunity to teach summer and night school, threatened with bodily harm, urged to resign, had his teaching methods interfered with, replaced in his position by a less qualified black American, had his teaching responsibilities removed from him, denied equal pay, and denied books and instructional materials. (A. 16-18)

These events occurred from the years 1972 through 1975 and caused him to be without tenure and subjected him to discharge. In addition, after Dr. Rick's most recent denial of tenure in February, 1974, petitioner's Trustees engaged in a review of that denial and on September 12, 1974 concluded that the denial was appropriate. Although Dr. Ricks was awarded a terminal contract on June 30, 1974, commencing September 1, 1974, and concluding on June 30, 1975, the contract

when issued was awarded to comply with certain Board of Trustees and AAUP requirements. It was clearly stated in the cover letter thereto that "should the Educational Policy Committee decide to recommend that you be granted tenure, and should the Board of Trustees concur with their recommendation, then of course, it will supersede any previous action taken by the Board." Notwithstanding the district court's finding that the operative date on which the violation of the statute occurred was June 30, 1974 when the terminal contract was awarded, this letter from the President of the Board of Trustees indicates from the face thereof that this action, the award of the terminal contract, was perfunctory and revocable. (A. 52-53). In fact, the Trustees did act thereafter and by letter of September 12, 1974, Dr. Ricks was notified of the fact that the decision would stand. Despite this act, he was evaluated thereafter by his Department Chairman in January, 1975 to measure his performance. The record is unclear as to why this was done, but it should suffice to say that respondent believed it to be a part of a continuing pattern of discrimination engaged in by petitioner. In addition, on December 4, 1974, respondent was assaulted by his former department chairman. At about the same time he petitioned the petitioner's president for reconsideration of his entire case given the highly irregular nature of the proceedings which progressed from 1972 through January, 1975 (A. 21-24).[4] When it became clear to respondent that his employment was to conclude in his discharge on June 30, 1975, he filed his charge of discrimination on April 4, 1975 with EEOC.

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4. Although the district court in its opinion (Pet. A. 280) concluded that respondent conceded at oral argument that there were only two points at which the 180 day period provided for in 42 U.S.C. §2000e-5(e) could have commenced, that conclusion misconstrues the record. A reading of the colloquoy between the court and counsel fails to reveal such a concession. (A. 76-77)

Despite the petitioner's contention that the procedure for tenure employed by it is highly regularized and that it concluded at the latest in February, 1974, clearly the course of conduct described in the respondent's pleadings and above indicate protracted and continuous activity on the part of the petitioner to deprive the respondent of his employment at the earliest opportunity available to petitioner, on June 30, 1975.

Respondent believes that the court of appeals was correct in holding that the discrimination alleged by him was continuing in nature, and that accordingly, inquiry should be made at trial as to the merits of his discrimination claim. Petitioner is in no way prejudiced by this consideration. Petitioner suggests in its brief that this is a matter that was dormant for over a year and one which respondent sought to revive by filing a charge with EEOC in April, 1975. In fact, the matter had been an ongoing one from and after 1972. This is factually different from the situation in *United Airlines v. Evans*, 431 U.S. 533 (1977), on which petitioner relies. In that case respondent therein sought to address a claim of discrimination through an attempt to raise the adverse effects of earlier taken actions which had ceased more than 180 days before the charge which formed the basis of his lawsuit was filed. No charge of discrimination had been filed with respect to the earlier taken action that had occurred more than 180 days before the charge on which her court suit was filed.

*United Airlines v. Evans*, 431 U.S. 553 (1977), does not abolish the long established doctrine of continuing violations under Title VII. *Evans* precludes the application of the continuing violation concept in circumstances where an individual files a charge alleging a violation to be the present effect of past discrimination, where the past violation is an event that occurred more than 180 days before the filing of the charge, and where the past violation has not itself been the subject of a charge within 180 days of its occurrence. *Bracamontes*

*v. Amstar Corporation*, 576 F.2d 61 (5th Cir. 1979); *Farris v. Board of Education of St. Louis*, 576 F.2d 765 (8th Cir. 1978); *Masco v. United Airlines*, 547 F.2d 1127 (3rd. Cir., 1977).

The aspect of continuing violation abolished in *Evans* is that alleged by the employee in that case who continued to feel the effects upon her return to employment, of previous discrimination for which she had not sought relief. The continuing effects alleged were the denial of seniority and concomitant benefits. Courts have since *Evans* held that continuing violations are cognizable under Title VII, provided that the charges are filed within 180 days of the time the violations end. So long as a violation continues, then a charge may be filed until it ceases. *Reed v. Lockheed Aircraft Corp.* — F.2d —, 22 EPD, ¶30,602 (9th Cir. 1980); *Clark v. Olincraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977).

Further, *Evans* does not abolish cases decided pre-Evans that do not come under the *Evans* doctrine. *Noble v. Rochester*, 535 F.2d 756 (2d Cir. 1976), *Egelston v. State University at Genesco*, 535 F.2d 752 (2d Cir. 1976) and *Jacobs v. Board of Regents*, 473 F.Supp. 663, 668 (S.D. Fla. 1979), are all cases where violations continued up to a point after the charge was filed.

The question that *Evans* mandates is when a continuing violation is alleged, is there a present violation which continues? The court of appeals below answered this in the affirmative because upon reviewing the course of conduct engaged in by the petitioner, it was clear to that court that respondent was continuously subjected on an on-going basis of conduct which was meant to deprive him of his employment on June 30, 1975. It should be noted that *Abramson v. University of Hawaii*, 594 F.2d 202, 209-210 (9th Cir. 1979) cited by petitioner was in fact remanded for consideration of whether the tenure process was irregular in that *Abramson* did not have her tenure reconsidered in her terminal year as she alleged by affidavit was frequently

the case. *Abramson* acknowledged that reconsideration of tenure would be either a violation itself or a continuing violation of the statute. Further, *Abramson* itself rules out the concept that reconsideration for tenure constitutes the revival of a prior stale claim such as would be barred by *United Airlines v. Evans*.

The court of appeals in the instant case found that during the course of his employment with the petitioner there might have been times at which he could have filed a charge alleging a continuing violation. Although it did not specifically state at what point those times occurred, respondent respectfully suggests that one of them might have been the point at which respondent was assaulted by his former department chairman, or at which he was re-evaluated and petitioned the president of the college to look into the matter because of the rather irregular events that were occurring. The earliest of these events, the assault, occurred in December, 1974. Assuming for the sake of argument that it occurred at the earliest point in December that it could have occurred (December 1), respondent would have had to file his EEOC charge by June 1, 1975. Clearly, his charge, filed within that time would be timely.

A further reason exists for finding that respondent's charge alleging that the ending of his employment by the petitioner was discriminatory, was timely. Discharge is a process in an academic institution. That process culminates when the employee ceases to render any services to the institution. If a discharge is alleged to be discriminatory, then clearly the entire process which created the discharge must be reviewed.

42 U.S.C. §20003-2(a) protects an employee from a variety of discriminatory conduct on the part of an employer. Among those from which an employee is protected is discriminatory discharge. If this particular section of Title VII is to afford protection to employees of academic institutions, then it is logical and reasonable to conclude that such an employee has the same right to be

free from having his employment ended in a discriminatory fashion as does an employee of any other institution. Employees of academic institutions must have the same right to be free from discriminatory discharge as do employees at non-academic institutions.

If one looks for guidance as to when a discharge violation occurs in a non-academic institution, one will find that the cases have held that a discharge occurs when the employee ceases to render his services to the institution. *Chappell v. Emco Machine Works Co.*, 601 F.2d. 1295, 1304 (5th Cir. 1979); *Bethel v. Jefferson*, 589 F.2d 631, 645 (D.C. Cir. 1978); *Payne v. Crane*, 560 F.2d 198, (5th Cir. 1977); and *Greene v. Carter Carburetor*, 532 F.2d 1256 (8th Cir. 1976) are cases wherein the court held that the date of violation arose in an allegation of discriminatory discharge when the employee last rendered services to the institution, not at a later date when pay and benefits ended. Further, *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821 (1979) held that under the Age Discrimination in Employment Act (ADEA)[6] an alleged violation of that statute alleging discriminatory discharge occurred on the last day the employee worked, not on his date of separation from the payroll.

As this court has held that the language of the two statutes, Title VII and ADEA, are similar and that a particular construction under similar sections of one of the statutes is strong support for a similar construction under the other, respondent urges this court to follow that precept here as well. *Oscar Mayer and Co. v. Evans*, — U.S. —, 99 S.Ct. 2066 (1979).

Further, it should be noted that *Electrical Workers v. Robbins and Meyers, Inc.*, 429 U.S. 229, 234-235 (1976) recognized the date of discharge as the date of violation. In *Robbins and Meyers*, petitioner argued that a grievance procedure tolled the time for filing a charge

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6. 29 U.S.C. §631 *et seq.*

because the discharge of the employee occurred at the conclusion of the grievance procedure rather than the date of discharge which was the last day worked. This Court held that the time for filing of a charge occurred at the time when the employee in question last rendered services to the employer.

## II. Respondent Alleged Violations Of 42 U.S.C. §1981 Which Continued To A Date Within The Three Year Statute Of Limitations Within Which He Was Required To And Within Which He Filed A Complaint In Court.

What can be said of the Title VII claim can be said of a 1971 claim as well. Respondent does not dispute the fact that Title VII and 1981 provide separate and independent bases for relief. *Johnson v. Railway Express Agency*, 421 U.S. 545 (1975). Indeed this court has held in *Johnson* that the same facts can give rise to separate claims and that the remedies are independent of one another. However, the fact that the same facts can give rise to separate and independent claims does not mean that the same facts cannot activate the separate statute of limitations in each of the statutes.

The statute of limitations in 1981 is admittedly the three-year statute of limitations held to apply by both the district court and the court of appeals. Further, petitioner and respondent are not disputing in this Court which statute of limitation applies. Both agree that the three-year statute of limitations applies to this claim. The only question raised by this issue on appeal is from what point in time the three-year statute runs. Petitioner contends that it runs from the date of notice of the terminal contract for that is the time when the respondent knew or should have known that his legal rights had been invaded. Respondent does not dispute the legal principle that the statute of limitations on a claim such as this runs from the time at which an individual has knowledge that his legal rights have been invaded.

*United States v. Kubrick*, — U.S. —, 62 L. Ed. 2. 259 (1979). Respondent disputes that he had such knowledge as of the time it is ascribed to him by petitioner. As with the Title VII claim, respondent urges that the conduct of the petitioner continued over an extended period of time and concluded only at the time when respondent became separated from his employment on June 30, 1975. As he filed his court suit on this claim within three years of that date, he did so within the time period provided for by the statute of limitations and his claim is properly before the court.

*Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979) holds that the relevant date for purposes of calculating the statute of limitations is "the last date on which a Defendant improperly harmed the Plaintiff . . ." Respondent submits that this date is the last day that he worked for petitioner. He bases his assertion on the fact that conduct of the employer continued over an extended period of time as previously argued in this brief. That conduct caused him to be separated from his employment on June 30, 1975 and is indeed the last date on which he was harmed by the petitioner. On that basis, the court of appeals' holding is correct and is not inconsistent with that of the Fifth Circuit in *Bernard*.

Finally, petitioner suggests that it has an interest in knowing a point will come at which it will not have to concern itself with respondent's claims once they have become stale. The position urged by the respondent here and held by the court of appeals below is not inconsistent with that policy. As the conduct complained of by respondent was on-going conduct and from the record, conduct actively pursued by the petitioner at least up through December, 1974 when respondent was assaulted, it cannot be said to be a stale claim when suit was filed within three years of that date. Petitioner is in no way prejudiced by having to defend this claim. Clearly, it has actively engaged in the conduct which gives rise to it at a time well within the statute of limita-

tions. Nevertheless, should this court decide that an earlier date, such as the date on which the Board of Trustees issued its final decision, September 12, 1974, is the appropriate time at which respondent knew that his rights were invaded, then it should still hold that this claim is not time-barred by the statute of limitations for clearly the court suit filed on September 7, 1977 was filed within three years of that date.

Respondent urges that this Court view the harm or legal injury to respondent in its appropriate light, as harm or injury which is essentially from his termination from employment which occurred on June 30, 1975.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals which reversed the dismissal of the district court should be affirmed.

Respectfully submitted,

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